Filed 12/5/16 In re M.A. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.A., Jr. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. M.A., Defendant and Appellant.	F073183 (Fresno Super. Ct. Nos. 15CEJ300299-1, 2 & 3) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Mary Dolas, Judge.

Conness A. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Kane, J. and Franson, J.

Mother appeals from the order of the juvenile court denying her reunification services once it assumed jurisdiction over the children, M.A., Jr.; A.A.; and Z.A. The juvenile court relied on Welfare and Institutions Code section 361.5, subdivision (b)(13) (hereafter subdivision (b)(13)) in making this order. Subdivision (b)(13) provides, in essence, that reunification services need not be provided to a parent who has an extensive history of drug abuse and "resisted" a prior court ordered treatment program.

Mother argues there is insufficient evidence in the record to establish that a prior court ordered a substance abuse treatment program for her. We affirm the order denying her reunification services.

FACTUAL AND PROCEDURAL SUMMARY

The Fresno County Department of Social Services (Department) filed a petition alleging the children came within the jurisdiction of the juvenile court pursuant to the provisions of Welfare and Institutions Code section 300, subdivisions (b) and (j).[1] As to the allegation pursuant to section 300, subdivision (b), the petition stated the children were at substantial risk of suffering physical harm or illness because of mother's lengthy history of drug abuse. At birth, the youngest child, Z.A., had been born exposed to methamphetamine, opiates, and marijuana. Mother had initially accepted voluntary family maintenance services, but failed to comply with those services by testing positive for amphetamines and opiates. The petition concluded the children would be at risk of abuse and neglect if left in mother's care.

The petition on this allegation continued by asserting father also regularly abused methamphetamine which interferes with his ability to care for his children placing them as substantial risk of suffering serious physical harm. Father also failed to comply with voluntary family maintenance services when he tested positive for amphetamines, and

[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

admitted using or being under the influence of methamphetamine while caring for his children. The petition concluded the children would be at risk of abuse and neglect if left in father's care.

The allegation pursuant to subdivision (j) stated that mother previously had the two older children removed from her care because of her substance abuse. The children were subsequently placed in father's care. As a result, the petition alleged the youngest child came within the provisions of this subdivision.

At the detention hearing the juvenile court placed the children with the Department and ordered reasonable visitation for both mother and father. At the contested jurisdiction/disposition hearing, the trial court found the children came within the provisions of section 300, subdivisions(b) and (i), and placed the children under the temporary care of the Department in relative placement. As relevant to this appeal, the trial court denied reunification services to mother pursuant to subdivision (b)(13).

DISCUSSION

Mother argues there is insufficient evidence to support the juvenile court's decision to deny her reunification services pursuant to subdivision (b)(13). Section 361.5, subdivision (a) provides the general rule that whenever a child is removed from the custody of its parent, the Department is required to provide child welfare services (generally referred to as reunification services) to the mother and father. (§ 361.5, subd. (a); *Riverside County Dept. of Public Social Services v. Superior Court* (1999) 71 Cal.App.4th 483, 487–488.) Sixteen exceptions to this general rule are found in subdivision (b). Although the Department argued that two exceptions applied in this case, the juvenile court found only subdivision (b)(13) was supported by clear and convincing evidence.

Subdivision (b)(13) provides that reunification services need not be provided to a parent when that parent "has a history of extensive, abusive and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year

period immediately prior to the filing of the petition … or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan … on at least two prior occasions, even though the programs identified were available and accessible."

There are two distinct provisions in subdivision (b)(13) on which the juvenile court may rely to deny a parent reunification services: (1) the parent has an extensive history of alcohol or drug abuse and resisted a prior court-ordered treatment program, or (2) the parent failed or refused to comply with a drug or alcohol treatment program provided for in a case plan on at least two prior occasions. In this case, the Department relied on the first prong of the statute. This prong has two elements, both of which must be proven by clear and convincing evidence: (1) the parent has an extensive history of alcohol or drug abuse, and (2) the parent resisted a court-ordered treatment program within three years of the filing of the petition. This appeal focuses on the second element.

"Subdivision (b)(13) of section 361.5 'reflect[s] a legislative determination that an attempt to facilitate reunification between a parent and child generally is not in the minor's best interests when the parent is shown to be a chronic abuser of drugs who has resisted prior treatment for drug abuse.' [Citation.] Experience tells us that such a parent has a high risk of reabuse. [Citation.] This risk places the parent's interest in reunifying with her child directly at odds with the child's compelling right to a 'placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.' [Citation.]" (*In re William B.* (2008) 163 Cal.App.4th 1220, 1228.) In other words, the exceptions in subdivision (b) constitute a legislative acknowledgement that under certain circumstances it may be fruitless to provide reunification services to a parent because reunification is unlikely. (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.)

At the combined jurisdiction/disposition hearing, mother's counsel conceded mother had an extensive history of drug abuse, but argued there was insufficient evidence

mother had been ordered by the court to participate in a drug treatment program. Appellate counsel also concedes mother has an extensive history of drug abuse, leaving as the only issue whether there is sufficient evidence in the record to support the juvenile court's conclusion that mother had been ordered by a court to participate in a drug treatment program.

This is not the first case wherein the question of whether a program constituted a court ordered treatment program. The parties have cited two cases which are particularly relevant. The first case is *D.B. v. Superior Court* (2009) 171 Cal.App.4th 197. The father was denied reunification services pursuant to the provisions of subdivision (b)(13). The father had an extensive history of drug abuse and was sentenced to four years in prison for receiving stolen property. Once released, the father twice violated his parole by continuing to use drugs. As a result, he was ordered by parole authorities to complete a residential treatment program. He completed the program, but resumed abusing drugs upon his release, again violating his parole. The child was born while the father was incarcerated on new charges. He sought to reunify with the child, but the juvenile court denied reunification services.

The father argued there was no evidence he had been ordered by the court to participate in a drug treatment program. He pointed out that he was required by the parole board to enter a program, but asserted this program was not court ordered and thus did not fall within the requirements of subdivision (b)(13). The appellate court disagreed.

The appellate court considered both the language and legislative history of subdivision (b)(13) in reaching its conclusion. It began its analysis by rejecting the distinction the father was making.

> "Construing the law as father suggests would produce an absurd consequence. We begin with the premise that a parent who has failed to participate in drug or alcohol treatment ordered directly by the court as a condition of probation in a criminal case may be denied services under section 361.5, subdivision (b)(13) if the other criteria of that provision are

met. [Citation.] There is no meaningful distinction between treatment ordered as a condition of probation and treatment ordered as a condition of parole for purposes of determining whether a parent's failure to comply signifies a substance abuse problem so intractable that the provision of reunification services would be a waste of time. In both situations, the parent faces incarceration as a consequence and has ample incentive to comply with the treatment condition imposed. [¶] … [¶]

"In light of these considerations, and to avoid an absurd result, we construe section 361.5, subdivision (b)(13)'s reference to 'court-ordered treatment' to include treatment ordered as a condition of parole. As the trial court observed, parole conditions, while not ordered directly by the court, are directly traceable to the court order imposing a prison sentence. Construing the phrase 'court-ordered treatment' to include treatment required as a condition of parole that flows from a court's original sentencing order furthers the statutory purpose of section 361.5, subdivision (b)(13) by allowing the court to identify parents who, due to their history of substance abuse and resistance to treatment in the face of penal or other legal sanctions, are unlikely to benefit from reunification services." (*D.B. v. Superior Court*, *supra*, 171 Cal.App.4th at pp. 203–204., fn. omitted.)

The appellate court next turned to the legislative history for support of its conclusion. It first observed that the requirement of court-ordered treatment was added to subdivision (b)(13) in 2002.

"In 2002, the Legislature passed Assembly Bill No. 1694, which, among other things, amended section 361.5, subdivision (b) to add the current language of paragraph (13), which specifies that the resistance to treatment necessary to trigger a bypass of reunification services must be resistance to *court-ordered* treatment. [Citation.] A Senate Analysis of this amendment explained that the bill '[c]larifies that reunification services need not be provided to a parent or guardian when one of several conditions is met, including that the parent or guardian has an extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment (not voluntary treatment) for this problem during a three-year period immediately prior.' [Citation.] The Analysis further states that the bill '[c]larifies that in order to completely forego reunification services due to a parent's failure to complete past drug treatment, the previous drug treatment must have been ordered by the court, not entered into voluntarily.' [Citation.]

"The 2002 amendment was thus designed to differentiate between court-ordered and voluntary treatment and to ensure that a parent's failure

> to seek voluntary treatment would not itself result in a denial of reunification services. Treatment ordered as a condition of parole is by no means voluntary. It would not, therefore, violate the purpose of section 361.5, subdivision (b)(13) to construe 'court-ordered treatment' to include treatment required as a condition of parole." (*D.B. v. Superior Court*, *supra*, 171 Cal.App.4th at pp. 205–206.)

The second case is *In re E.G.* (2016) 247 Cal.App.4th 1417. As in this case, the mother in *In re E.G.* conceded she had an extensive history of drug abuse, but argued she had not resisted a prior court-ordered treatment program. The record established that after one of the mother's convictions, she was ordered to participate in a Penal Code section 1000 program. The mother contended she was not ordered to participate in the program, but was merely given the option of participating in the program or serving time in jail. The appellate court rejected this argument.

Agreeing with the reasoning in *D.B. v. Superior Court*, the appellate court concluded that treatment pursuant to Penal Code section 1000 is a prior court-ordered treatment for the purposes of subdivision (b)(13). (*In re E.G.*, *supra*, 247 Cal.4th at p. 1427.) The appellate court noted the Penal Code section 1000 program permits first time drug offenders to bypass the normal criminal process and enter a drug treatment program. (*Ibid*.) The treatment program must meet statutory requirements. (*Id*. at pp. 1427–1428.) Satisfactory completion of the program results in dismissal of the criminal charges, while unsatisfactory performance results in a conviction. (*Id*. at p. 1428.)

> "In sum, for these purposes treatment ordered by a court under [Penal Code section 1000] is analogous to treatment ordered by a court pursuant to parole or a grant of probation. In all three circumstances, it arises in an unrelated criminal proceeding, carries the risk of jail time for failure to cooperate, and 'is by no means voluntary.' [Citation.] This is true even though [Penal Code section 1000] may be an entry level treatment program and the treatment details may vary from county to county. [Citation.]" (*Ibid.*)

These cases establish that when the legislature amended subdivision (b)(13) in 2002, its intent was to ensure that parents were not penalized for failing to voluntarily enter a drug treatment program by ensuring that the program was ordered by the court.

With these principles in mind, we turn to the facts in this case. The Department relied on numerous certified documents from the El Dorado County Superior Court to support the subdivision (b)(13) allegation. The Department asked the juvenile court to take judicial notice of the documents, and no objection appears in the record.[2]

The documents come from three different actions, one for each of mother's three children, K.C.; M.A., Jr.; and A.A.[3] Each group of documents contains a petition for the respective child and various minute orders from the action. Each petition was filed on September 27, 2011, and appears to arise out of the same set of circumstances. Mother was found passed out in a vehicle in the parking lot of a grocery store. Mother admitted to consuming alcohol and heroin. Three-year old M.A. and eight-month old A.A. were in the back seat of the vehicle crying. K.C. was apparently at school when these events occurred. In addition, mother tested positive for marijuana and admitted using alcohol while pregnant with A.A. The petition alleged the children came within the provisions of section 300, subdivision (b).

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[2] We could not locate in the record any ruling by the juvenile court on the request for judicial notice. However, both parties relied on the documents submitted to argue their respective positions to the juvenile court, and the juvenile court relied on the documents in rendering its decision on whether the evidence supported the bypass provisions cited by the Department. Mother does not now argue the documents are not part of the record.

[3] K.C. is mother's child by a different father, and apparently was placed with that child's father by the El Dorado Superior Court. Accordingly, K.C. is not a party to this action. Mother gave birth to a fourth child, Z.A., after the El Dorado County action ended.

The K.C. Dependency Action

The first minute order in the action filed on behalf of K.C. was filed on October 4, 2011, after the detention hearing. The order indicates the child was placed with his father, but care of the child was vested with the El Dorado Department of Human Services (EDDHS). The order provided that "[t]he services below will be provided pending further proceedings;" and then indicated mother would be provided alcohol and drug testing, mental health services, and "*drug treatment* as provided by the [EDDHS]." (Italics added.)

The next minute order is from the October 19, 2011, jurisdictional hearing. This minute order establishes the juvenile court found it had jurisdiction over K.C., and sustained the section 300, subdivision (b) allegation. There is no reference to alcohol or drug treatment in this minute order or the attachments thereto, although the minute order states the mother is to have visitation with the children at the Camino Progress House. The Department appears to argue the Camino Progress House is a drug treatment program, therefore the requirements of subdivision (b)(13) are met. We reject this argument because there is nothing in the record to support the assertion that the Camino Progress House is a drug treatment program.

The next minute order is from the uncontested disposition hearing. At this hearing the juvenile court removed K.C. from mother's custody and placed the child with father, although the child remained under the supervision of the juvenile court and the EDDHS. Mother was granted unsupervised visits at the Camino Progress House. There is no direct reference to alcohol or drug treatment for mother.

The next minute order, dated October 17, 2012, is from a status review hearing. The hearing was eventually continued, and there is a reference to mother receiving treatment. However, the type of treatment is not specified, although it seems probable mother was participating in a drug treatment program. Nonetheless, there is no reference to mother's participation being pursuant to a court order.

At the continued hearing, the juvenile court ordered joint legal custody of K.C. to mother and the father of K.C., with the father receiving temporary sole physical custody. The juvenile court terminated its jurisdiction and discharged the case. There is no reference in the remainder of the file to mother participating in a drug treatment program.

The M.A., Jr. Dependency Action

The detention hearing was held on September 28, 2011. The juvenile court detained M.A. from mother and placed him with his father. The minute order makes the same reference to drug treatment as does the detention order in K.C.'s file, i.e., the Department was to provide mother with alcohol and drug testing, mental health services, and "*drug treatment* as provided by the [EDDHS]." (Italics added.)

In the minute order from the October 19, 2011, jurisdiction hearing the juvenile court sustained the petition. No reference is made to alcohol and/or drug testing or treatment.

The minute order from the November 9, 2011, disposition hearing establishes the juvenile court placed M.A., Jr. with his father with formal supervision by the EDDHS. Mother was provided with visitation, including overnight visitation at the Camino Progress House. There is no other reference to drug or alcohol treatment for mother in this order.

The 12-month review hearing was held on October 19, 2012. The order from this hearing indicates the case plan was amended to include substance abuse services for father, and drug testing for mother. Custody was returned to mother and father with the EDDHS to provide family maintenance services. A status review hearing was scheduled in 90 days.

The EDDHS filed a request to change a prior order which was heard on November 16, 2012. The minute order from this hearing indicates mother relapsed, and ordered services be terminated for mother and the children placed with father. Mother was ordered to stay away from the family home, but was permitted supervised visitation.

At a hearing held on November 28, 2012, the court terminated dependency and the petition was dismissed. Father was awarded sole legal and physical custody of the children. Mother was allowed supervised visits twice per week.

The A.A. Dependency Action

The detention hearing was held on September 28, 2011. The minute order from this hearing indicates the juvenile court detained A.A. from mother, and placed him with father. Mother was to be provided with alcohol and drug testing and mental health services. Mother was provided visitation twice per week. The reference to a drug treatment program is omitted from this detention order.

The jurisdiction hearing was held on October 19, 2011. The minute order from this hearing indicates the juvenile court sustained the petition, and placed the child with the Department. Mother was provided with supervised visitation. Although the minute order does not so state, it appears the child was placed with father. No reference is made to alcohol or drug treatment.

The disposition hearing was held on November 9, 2011. The minute order from this hearing stated father retained custody of A.A. with the EDDHS continuing supervision. Mother was granted unsupervised visitation including overnight visits at Camino Progress House.

The 12-month review hearing was held on October 19, 2012. The minute order from this hearing states that the case plan was amended to include substance abuse services for father and drug testing for mother three times per week. A.A. was returned to the custody of mother and father.

Shortly thereafter, a request to change a court order was filed by the EDDHS. The hearing on the request was held on November 16, 2012. The minute order indicates mother had a relapse, and the children were placed with father. Mother was not allowed to be in the home. She was provided supervised visitation twice weekly. On November

28, 2012, the juvenile court terminated dependency jurisdiction and dismissed the petition. Father was awarded legal and physical custody.

Analysis

Our task is to determine whether there is substantial evidence to support the juvenile court's finding that mother fell within the provisions of subdivision (b)(13). Because of the concessions about mother's drug history, the only issue is whether there is substantial evidence that mother was ordered to participate in a drug treatment program within the meaning of subdivision (b)(13).

The standard of review we apply when assessing the sufficiency of the evidence is well established. Our review is deferential. We " 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could [find the contested fact true].' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203, disapproved on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189–1190.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

We apply this standard to the evidence provided in this case. We begin with the statute, the relevant portions of which provide that reunification services need not be provided if the juvenile court finds by clear and convincing evidence the parent has a history of drug abuse and "has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition." (§ 361.5, subd. (b)(13).) Mother argues there is insufficient evidence that she had been *ordered by a court* to participate in a drug treatment program.

From our review of the above evidence, the only evidence of a court order requiring mother to participate in drug treatment is found in the detention hearing orders for K.C. and M.A. The relevant portion of the order is a preprinted form with numerous blanks which can be selected as appropriate. The specific portion of the order stated "The services below will be provided pending further proceedings." The juvenile court could then pick from six different options for services to be provided. One of the options selected for mother in this case was "drug treatment as provided by the Department." Also relevant is item 12h. of the order. This provision provides that "Services, including those set forth in item 13, are to be provided to the family as soon as possible to reunify the child with his or her family." The portion of the order described above is item 13.

Mother argues that this is not an order requiring mother to participate in alcohol or drug treatment, but instead was an order directing the EDDHS to provide mother drug treatment. We disagree because this argument adds to subdivision (b)(13) a requirement that the juvenile court directly order mother to participate in a drug treatment program. However, the statute as written requires only that mother resisted a prior court ordered substance abuse treatment program. In this case, the juvenile court ordered at the detention hearing that mother be provided with a drug treatment program. Whether the order was directed at EDDHS or mother is irrelevant so long as the order provided treatment be made available to mother.

As in *D.B. v Superior Court, supra*, 171 Cal.App.4th 197, mother's argument would lead to absurd results. For example, in this case the court ordered mother be provided a drug treatment program at the detention hearing. Because it appears mother entered the program, no further order was made requiring her to enter a program. When the order was made, mother's failure or success in the program would directly affect her ability to reunify with her children. If mother refused to enter the program, she would likely not reunify with her children. If she successfully completed the program and maintained her sobriety, as initially occurred in this case, she would reunify with the

children. Mother lost custody of her children because she was not able to maintain her sobriety. These circumstances would be identical if the mother was ordered to enter a drug treatment program at a later hearing. Mother's options, enter and succeed or refuse to enter, would be the same. The consequences of success or failure would also be the same. There is no reasoned justification to suggest that a different result should be reached simply because the order for drug treatment was made at the detention hearing and not at the disposition hearing.

Finally, we observe the issue at which the 2002 amendment to subdivision (b)(13) was directed (voluntary treatment) is not implicated in this case since mother does not argue she voluntarily entered treatment. Therefore, the suggestion that the legislative history mandates the juvenile court specifically order mother into drug treatment reads too much into the statute and its legislative history.

Accordingly, we conclude the orders from the detention hearing for K.C. and M.A. provides substantial evidence that a prior court ordered a drug treatment program for mother within the meaning of subdivision (b)(13). This conclusion is also supported by section 319, which provides the statutory authority for the initial hearing, in this case the detention hearing. The relevant portion of subdivision (e) of this section provides that if the juvenile court orders a child detained, it must "order services be provided as soon as possible to reunify the child and his or her family if appropriate." (See also Cal. Rules of Court, rule 5.678(c)(3)(C) [If the child is detained, the juvenile court must "[i]f appropriate, order services to be provided as soon as possible to reunify the child and the child's family."].) The juvenile court's detention orders in this case were consistent with the duties imposed by section 319, subdivision (e).

DISPOSITION

The order denying mother reunification services pursuant to subdivision (b)(13) is affirmed.